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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1932

THE UNITED STATES OF AMERICA, APPELLANT

v.

SHREVEPORT GRAIN & ELEVATOR COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES

(REVISED)

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OPINION BELOW

The opinion of the District Court (R. 12) has not been reported. A memorandum opinion by the same court in an earlier case against the same defendant based on similar facts and upon which the court relied in the present case (R. 10) is reported in 46 F. (2d) 354.

JURISDICTION

The judgment to be reviewed was entered February 19, 1932. (R. 12.) The appeal was allowed March 7, 1932. (R. 15.) The jurisdiction of this

Court rests on the Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 8 of the Food and Drugs Act, as amended, is unconstitutional on the ground that it is so indefinite as not to inform the accused of the nature and cause of the accusation against it.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, and regulations involved are set forth in Appendices A and C, *infra,* pp. 25–32, 37–40.

STATEMENT

The defendant was indicted on November 4, 1931, for a violation of paragraph 3 of Section 8 of the Food and Drugs Act, as amended by the Act of March 3, 1913 (*infra,* p. 30), by marking on the outside of sacks of ground meal, forming three consignments shipped in interstate commerce, a quantity greater than was actually contained in the sacks. (R. 1–8.)

The defendant demurred to the indictment on the ground that it charged no offense against the United States. The defendant also filed a motion to quash on the ground that the provisions of the Act on which the indictment was based were unconstitutional under Articles I, II, and III, and

Amendments V and VI of the Constitution. (R. 9, 10.)

The District Court sustained the motion to quash, stating in its memorandum opinion that the decision was based on "the reasons given in memorandum opinion handed down in a similar prosecution by the Government against this defendant some months ago (U. S. vs. Shreveport Grain & Elevator Company, No. 5542)." (R. 12.) In the earlier opinion the court had held that "the asserted ground of unconstitutionality under the sixth amendment, is well founded." (R. 11.)[1]

The United States thereupon took this appeal.

SPECIFICATION OF ERRORS

The District Court erred—

1. In sustaining the demurrer to the indictment.

2. In sustaining the motion to quash the indictment.

3. In holding that the third paragraph of Section 8 of the Food and Drugs Act, as amended, relating to the misbranding of food (U. S. C., Title 21, Sec. 10), under which the indictment was laid, violates the Sixth Amendment of the Constitution of the United States.

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[1] The first prosecution was brought by information, and consequently the adverse decision of the District Court in that case was not subject to review by this Court under the Criminal Appeals Act. This proceeding was begun by indictment against the same defendant on similar facts, so that the question could be brought to this Court by appeal.

SUMMARY OF ARGUMENT

This controversy could not have arisen under the statute as originally enacted, which made it a misdemeanor not to state the weight or measure of a package "plainly and correctly," *if* stated at all. The amended provision, now in question, *requires* the contents of a package to be "plainly and conspicuously marked" on the outside; and the question in this case is whether this amendment rendered the statute unconstitutional because it also contained a proviso that "reasonable variations" shall be permitted and that tolerances and small package exemptions shall be established by rules and regulations promulgated by the Secretaries of Agriculture, Commerce, and the Treasury.

The statute in question fully satisfies the requirement of due process under the Fifth Amendment, and is not repugnant to the Sixth Amendment because of any uncertainty in its definition of an offense. Pursuant to its terms a regulation was adopted which has been in force for over eighteen years. This regulation clearly classifies and characterizes the permissible variations from accuracy of statement, and leaves no room for the contention that the nature of the offense is too indefinite and uncertain to afford a defendant the due process guaranteed under the Fifth Amendment, or the information regarding the nature and cause of the accusation required under the Sixth Amendment.

The legislative history of the amended statute shows that it was adopted because of the desirabil-

ity of *requiring* content marking of packages, and that the proviso was included because of the recognized impossibility in practice of absolute accuracy of statement in all cases. The problem was one often dealt with in State statutes, and many States have followed the example of this statute providing for reasonable tolerances. There are now twenty-nine States and one Territory having similar statutes. Numerous decisions of this Court in analogous situations sustain the view that the statute now in question is not unconstitutional.

United States v. *Cohen Grocery Co.*, 255 U. S. 81, upon which the District Court relied, is distinguishable, since the statute in that case fixed no ascertainable standard whatsoever, whereas under the Food and Drugs Act a definite standard, requiring accuracy of statement, is prescribed, and reasonable tolerances are permitted under regulation. Upon compliance with the standards set by the statute all persons may be assured that there is no possible criminal liability. Reasonable variations are also beyond the reach of criminal prosecution. The regulations are reasonable, definite, and certain.

The Sixth Amendment can have no application to this case, because the prosecution of an offense under the Food and Drugs Act is not a "criminal prosecution" within the meaning of that amendment. It is at most a petty offense, to the prosecution of which the guarantees of the Sixth Amendment are inapplicable.

ARGUMENT

I

PRELIMINARY STATEMENT

Section 2 of the Food and Drugs Act (Act of June 30, 1906, c. 3915, 34 Stat. 768; U. S. C., Title 21, Sec. 2; *infra*, pp. 26–27) made it unlawful to ship in interstate commerce any article of food which was "adulterated or misbranded." It provided that any person violating this provision should be guilty of a "misdemeanor" and should be fined "not exceeding two hundred dollars for the first offense."

In Section 8 of the Act (*infra*, pp. 27–30) the term "misbranded," as used in the Act, was defined. One of the circumstances in which it was provided that an article of food should be deemed misbranded within the Act was:

> Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

If this provision had remained unchanged, the present controversy could not have arisen. But the Act of March 3, 1913, c. 117, 37 Stat. 732, amended the Pure Food and Drugs Act of 1906 by striking out the clause which has just been quoted and inserting in its place the following:

> Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical

> count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.

The amended provision now in question *requires* the contents of a package to be "plainly and conspicuously marked" on the outside. And the question in this case is whether this amendment is unconstitutional because it also contains a proviso that "reasonable variations" shall be permitted and that tolerances and small-package exemptions shall be established by rules and regulations promulgated by the Secretaries of Agriculture, Commerce, and the Treasury.

The legislative history shows that this amendment was urged and adopted because of the desirability of *requiring* that goods sold in package form be marked in terms of weight and because of the impossibility in practice of complying with such a requirement unless some allowances were made. Extracts from the Committee Reports and Hearings on the measure are set forth in Appendix B, *infra,* pp. 33–36.

The provisions of the Federal Food and Drugs Act involved in this case have been incorporated into the food and drugs laws of many States. Some of these provisions allowing "reasonable variations" were enacted before the amendment of the

Federal Act in 1913, but most of them followed the amendment and were modeled after it. A detailed examination of the State legislation discloses that twenty-nine States and Hawaii have laws requiring that articles sold in packages be branded with the weight of the contents, with the further provision that "reasonable variations" shall be allowed.[2] In most of the States this provision is included in the food and drugs laws, but in a few it is a part of closely analogous legislation. References to these State statutes are given in Appendix D (*infra*, pp. 41–43).

There have been very few decisions respecting the constitutionality of provisions such as the one here involved, although the Federal provision has been enforced for nearly twenty years. Five cases have arisen under the Federal statute. In *United States* v. *Merchants Biscuit Co.*, decided Oct. 25, 1924, an unreported case, the District Court for Colorado held the statute constitutional against the arguments adopted by the court below in this case. The statute was also held valid in *United States* v. *Centralia Dairy Co.*, unreported, decided July 18, 1932, by the District Court for the Western District of Washington. In *United States* v. *Shreveport Grain & Elevator Co.*, 46 F. (2d) 354, and in the present case, the court below held the statute unconstitutional. In *United States* v. *American Maid Flour Mill Co.*, unreported (S. D. Tex.), the stat-

[2] Similar legislation is in force in England. See Appendix, D, *infra*, pp. 43–44.

ute was also held unconstitutional, the court stating from the bench that it was following the *Shreveport* decision.

An exhaustive search for cases under the State statutes has disclosed only one. *Ex parte Humphrey,* 92 Tex. Crim. 501, arose under a statute which was different in setting from that here involved, but in substance and wording much the same. (Tex. Acts 1919, c. 130, Sec. 8.) The statute was held unconstitutional; but the decision does not refer to the Federal Constitution and seems to have been based entirely on State grounds.

II

THE STATUTE FULLY SATISFIES THE REQUIREMENT OF DUE PROCESS UNDER THE FIFTH AMENDMENT, AND IS NOT REPUGNANT TO THE SIXTH AMENDMENT BECAUSE OF ANY UNCERTAINTY IN ITS DEFINITION OF AN OFFENSE

The statute involved in this case provides that—

> reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act.

Section 3 of the Food and Drugs Act (*infra,* p. 27) referred to in this provision authorized the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce to make "uniform rules and regulations for carrying out the provisions of this Act."

Shortly after the Act of March 3, 1913, was adopted, a question arose whether the language

quoted above authorized the three Secretaries to promulgate regulations regarding "reasonable variations." Attorney General McReynolds replied to a request for his opinion that the Secretaries had such power. 30 Op. A. G. 222.

Pursuant to the authority given by the statute as construed by the Attorney General, the Secretaries promulgated a regulation with respect to marking the quantity of food in package form. This regulation was contained in Food Inspection Decision 154, which was issued on May 11, 1914, as an amendment to Regulation 29 of the Rules and Regulations for the enforcement of the Food and Drugs Act (*infra*, pp. 37–40). It provided in part as follows:

> (*i*) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:
>
> (1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing conducted in compliance with good commercial practice.
>
> (2) Discrepancies due exclusively to differences in the capacity of bottles and similar containers resulting solely from unavoidable difficulties in manufacturing such bottles or containers so as to be of uniform capacity: *Provided,* That no greater tolerance shall be allowed in case of bottles or similar containers which, because of their design, can not be made of approximate uniform capacity than is allowed in case of bottles or similar containers which can be

manufactured so as to be of approximate uniform capacity.

(3) Discrepancies in weight or measure due exclusively to differences in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case.

This regulation has been in force without change for over eighteen years. It now appears as Regulation 26 of the Rules and Regulations under the Food and Drugs Act (ninth edition), promulgated August 29, 1927. It clearly characterizes the permissible variations as those which are uncontrollable and which may vary one way or the other without manipulation on the part of the seller. It expresses the thought that variations that uniformly or in a preponderance of cases favor the seller as against the buyer are *prima facie* evidence of an intent to cheat, or of such carelessness as should come within the ambit of the statute.

The regulation was in force long before the commission of the offenses charged in the indictment in the present case. Under it the prohibition of

the statute is made definite and certain.[3] It clearly classifies and characterizes the permissible variations from accuracy of statement and leaves no room for the contention that the offense is too indefinite and uncertain to afford a defendant the due process guaranteed under the Fifth Amendment or that understanding of the accusations which is required under the Sixth Amendment. It is, of course, well settled that Congress has authority to provide for the issuance of such regulations and to make their violation an offense. *In re Kollock*, 165 U. S. 526; *Buttfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1.

In framing the Act and in formulating regulations, it obviously was impossible to prescribe a table of weights and measures to cover permissible variations of all commodities subject to the Act. Neither the Fifth nor the Sixth Amendment requires such particularity. This Court has frequently sustained statutes of the present type, construing them in the light of the obvious purpose of the legislative body.

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[3] There is a close analogy to the rule that a long-continued practical construction of a doubtful or ambiguous statute by the administrative officers charged with its enforcement is entitled to great weight and will not be upset unless clearly wrong. *Logan* v. *Davis*, 233 U. S. 613, 627; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Brewster* v. *Gage*, 280 U. S. 327, 336.

In *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 109, a statute denouncing contracts "reasonably calculated" to fix and regulate prices of commodities and acts which "tend" to accomplish the prohibited results, was objected to on the ground that it was so indefinite that no one could tell what acts were embraced within its provisions. But this Court held the statute to be constitutional.

In *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, it was contended that the word "kosher" and the phrase "orthodox Hebrew religious requirements" contained in a statute regulating the sale of meat were so indefinite and uncertain as to render the statute unconstitutional. This Court held that the statute required no more than an honest purpose on the part of sellers to distinguish between what is and is not "kosher," and further that the term "kosher" has a meaning well enough defined to enable one engaged in the trade to apply it correctly. In *Miller* v. *Strahl*, 239 U. S. 426, this Court decided that a statute requiring hotel proprietors "to do all in their power" to save guests in case of fire was not invalid for uncertainty. In *Omaechevarria* v. *Idaho*, 246 U. S. 343, the Court held that a statute in which the words "usual" and "range" were used in connection with cattle feeding was sufficient, as "men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it." In *Sproles* v. *Binford*, 286 U. S. 374,

392–393, the Court upheld a Texas statute limiting the net loads of trucks using the highways, despite provisions exempting vehicles used to transport property from point of origin "to the nearest practicable common carrier receiving or loading point" or from a common carrier unloading point "by way of the shortest practicable route to destination." The contention that this language was so uncertain that it did not afford a sufficient standard of conduct was rejected. In *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18, this Court held that a California statute prohibiting "unreasonable" waste of natural gas was not, in the light of the construction of the state court, "invalid upon its face, merely by reason of uncertainty," so as to deprive the state court of jurisdiction to determine whether there had been unreasonable waste with respect to a particular field. See also *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 366–367, and *Lavine* v. *California,* 236 U. S. 528.

The cases just referred to arose under the Fourteenth Amendment, but they would seem to be equally applicable under the similar language of the Fifth Amendment. *Nash* v. *United States,* 229 U. S. 373, was decided under the Fifth Amendment. There an indictment under the Sherman Act was demurred to on the ground that the statute was so vague as to be inoperative. It was contended that the crime defined contained in its definition an element of degree as to which estimates might differ, with the result that a man might find

himself imprisoned because his honest judgment did not anticipate that of a jury of less competent men. This Court held that there was no constitutional difficulty in the way of enforcing the Act, and said (p. 377):

> But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.

See also *Farmers' Livestock Commission Co.* v. *United States,* 54 F. (2d) 375 (E. D. Ill.), in which a three-judge court held valid the Packers and Stockyards Act (c. 64, 42 Stat. 159), which forbids "unfair, unjust, unreasonable, and discriminatory practices."

Although, as we contend (*infra,* pp. 20–23), the Fifth Amendment is the only constitutional provision involved in this case, there is at least one decision under the Sixth Amendment which supports our view. In *Seven Cases* v. *United States,* 239 U. S. 510, another provision of Section 8 of the Food and Drugs Act was attacked under the Sixth Amendment. The contention was that it did not permit the laying of a definite charge because statements, to fall within its prohibitions, must be "false and fraudulent." This Court held the statute valid.[4]

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[4] The same result was reached as to certain provisions of Section 8 of the Food and Drugs Act in *United States* v. *Sweet Valley Wine Co.*, 208 Fed. 85 (N. D. Ohio).

In holding the statute here in question unconstitutional, the lower court relied upon this Court's decision in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81. That case arose under Section 4 of the Lever Act, making it unlawful "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" or to conspire "to exact excessive prices for any necessaries." This Court held that the words quoted did not fix an ascertainable standard of guilt, saying (p. 89):

> Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. * * *

Thus the statute held unconstitutional in the *Cohen Grocery* case was quite different from that involved here. There the prohibition was the exaction of unjust, unreasonable, or excessive prices for necessaries. Here the statute requires that the

weight of a product sold in packages be marked on the label, authority being given to named officials to establish reasonable variations and tolerances.

This distinction between the *Cohen Grocery* case and cases such as the present was pointed out by this Court in the *Cohen Grocery* opinion itself. Counsel for the Government in that case relied on cases such as *Waters-Pierce Oil Co.* v. *Texas,* 212 U. S. 86, *supra.* But this Court held them inapplicable (p. 92)—

> because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.

Under Section 4 of the Lever Act it was necessary to consider an almost unlimited number of widely varying factors which influenced cost, transportation, distribution, and profit, and to determine the meaning of "necessaries." There was no single factor that could be used as a basis of action or standard of conduct.[5] Under the section involved in this case there is a single definite factor—weight.

[5] The *Cohen* case was recently followed in *Champlin Refining Co.* v. *Commission,* 286 U. S. 210, 243, where the Court held unconstitutional as fixing no ascertainable standard of conduct a penal statute prohibiting waste in the production of crude oil in Oklahoma, "waste" being defined to include "economic waste, underground waste, surface waste, and waste incident to the production of crude oil or petroleum in excess of transportation or marketing facilities or reasonable market demands." Compare *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 18, *supra.*

A person subject to the provisions of the statute may always safeguard himself by making sure that his packages contain the weight which he marks upon them. A question arises only when he markets a package which is short in weight; then he may be allowed a "reasonable variation" or "tolerance." While, of course, one seeking to evade the statute may have difficulty in determining the extent of this twilight zone created for his benefit, a definite course of conduct is provided for the honest trader which he may always pursue with the knowledge in advance that he is not violating the statute; for so long as his packages contain full weight it is plain that he has committed no violation of the law. The infirmity in the statute involved in the *Cohen Grocery* case was that it fixed no standard, so that no act could be certainly immune from criminal consequence. In the present case a definite standard is provided, and the defendant is informed in advance that if he gives full weight he will be subject to no penalty.

This distinction was well stated by the court in *United States* v. *Merchants Biscuit Co.,* decided October 25, 1924, unreported, in which the District Court for Colorado held that the statute now involved was constitutional. In a memorandum opinion the court said:

> I do not think that *U. S.* v. *Cohen Grocery Co.,* 255 U. S. 81, and similar cases construing the food control act, otherwise known as the Lever Act, are in point. That statute

clearly did not fix an ascertainable standard of guilt that in any way informed a defendant accused of violating the act of the charge against him.

The act in question here, however, is very specific that the weight and measure, or numerical count, must be plainly stated on the package, in so many words. There can be no doubt as to what the producer or manufacturer must do under that provision, and it is not made uncertain because a "reasonable variation" shall be permitted. That does not mean that persons subject to the act do not have to be accurate in their representations, and that they do not have to ascertain and affix the weight, measure, or numerical count at the time they put up the package, etc. It does mean, that if, due to causes over which they have no control an unavoidable variation occurs after the goods leave their possession, then the law is not violated if the variation is a reasonable one.

That part of the section which is attacked, therefore imports common sense or the rule of reason into the act, and does not require the impossible. But for this provision we might be compelled to hold it unconstitutional under the doctrine of *Burns Packing Co.* v. *Bryans,* 264 U. S. 504, as imposing an intolerable burden, or impossible requirement.

Another distinction between the statute involved in the *Cohen Grocery* case and the Food and Drugs

Act is readily apparent. The Lever Act provided for a fine up to $5,000 or for imprisonment up to two years or both. It thus created a serious criminal offense subject to severe punishment. The Food and Drugs Act is a regulatory and remedial statute. The maximum penalty for a first offense against its provisions is a fine of $200. Quite apart from the applicability of the Sixth Amendment to offenses under the Food and Drugs Act, which we discuss below, we believe that the Constitution requires no such rigid certainty in provisions like those here involved as it does in defining a serious criminal offense for which the punishment may be imprisonment in the penitentiary.

Moreover, the Sixth Amendment, upon which the court below relied, seems to have no application to this case, because the prosecution of an offense under the Food and Drugs Act is not a "criminal prosecution" within the meaning of that amendment. It is at most a petty offense, to the prosecution of which the guarantees of the Sixth Amendment are inapplicable.

The penalty provided in Section 2 of the Food and Drugs Act (*infra*, pp. 26–27) for a violation of the provisions of the Act is a fine "not exceeding two hundred dollars for the first offense." Thus the offense with which the defendant was

charged in this case was a "petty offense." In at least two cases it has been directly held that a violation of the Food and Drugs Act is a petty offense (*Frank* v. *United States,* 192 Fed. 864 (C. C. A. 6th); *Huyler's* v. *Houston,* 41 App. D. C. 452), and several decisions on related questions sustain this view.[6] Furthermore, the offense falls within the definition of "petty offense" contained in the Act of December 16, 1930, c. 15, 46 Stat. 1029 (U. S. C. Sup. V, Title 18, Sec. 541; *infra,* p. 31).[7]

This Court has repeatedly upheld the view that "petty offenses" may be tried without a jury. *Callan* v. *Wilson,* 127 U. S. 540, 557; *Schick* v. *United*

[6] It is held that prosecution under the Act may be begun by information. *United States* v. *J. Lindsay Wells Co.,* 186 Fed. 248 (W. D. Tenn.); *United States* v. *Wells,* 225 Fed. 320 (W. D. Tenn.); *United States* v. *Weeks,* 225 Fed. 1017 (S. D. N. Y.); *United States* v. *J. L. Hopkins & Co.,* 228 Fed. 173 (S. D. N. Y.). And conviction may be had under the Act without showing criminal intent. *Von Bremen* v. *United States,* 192 Fed. 904, 906 (C. C. A. 2d); *United States* v. *Sprague,* 208 Fed. 419 (E. D. N. Y.). See *United States* v. *Thirty-six Bottles of London Dry Gin,* 210 Fed. 271 (C. C. A. 3d); *United States* v. *Thirteen Crates of Frozen Eggs,* 215 Fed. 584 (C. C. A. 2d); *United States* v. *Two hundred sixty-seven Boxes of Macaroni,* 225 Fed. 79 (W. D. Pa.). *Dr. J. H. McLean Medicine Co.* v. *United States,* 253 Fed. 694 (C. C. A. 8th), is apparently to the contrary.

[7] This statutory definition of "petty offenses" was enacted some time after the commission of the offenses alleged in the indictment in this case. But as the statute seems to be declaratory of the preëxisting law, there is no objection to its application in the present case.

States, 195 U. S. 65, 70–71; *District of Columbia* v. *Colts,* 282 U. S. 63, 72–73.[8] See also Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 Harvard Law Review 917. In the *Colts* case, *supra,* this Court said (282 U. S. at pp. 72–73):

> By § 165 of the D. C. Code [*infra,* pp. 31–32], the Constitution is made the test—as, of course, it must be—to determine whether the accused be entitled to a jury trial. Article III, § 2, cl. 3, of the Constitution provides that "The trial of all crimes, except in cases of impeachment, shall be by jury." This provision is to be interpreted in the light of the common law, according to which petty offenses might be proceeded against summarily before a magistrate sitting without a jury. See *Callan* v. *Wilson,* 127 U. S. 540, 557. That there may be many offenses called "petty offenses" which do not rise to the degree of *crimes* within the meaning of Article III, and in respect of which Congress may dispense with a jury trial, is settled. *Schick* v. *United States,* 195 U. S. 65.

If Congress may provide that "petty offenses" may be tried without a jury, such a proceeding can not be a "criminal prosecution" within the meaning of the Sixth Amendment, for that Amendment

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[8] See also *Ex parte Milligan,* 4 Wall. 2, 123; *Counselman* v. *Hitchcock,* 142 U. S. 547, 563; *United States* v. *Zucker,* 161 U. S. 475, 481. Offenses against the Food and Drugs Act may be tried in the police court of the District of Columbia. *Huyler's* v. *Houston,* 41 App. D. C. 452.

guarantees the right of trial by jury in all criminal prosecutions. It follows from this that the other provisions of the Sixth Amendment (contained in the same sentence as the clause conferring the right to trial by jury) are not applicable to trials for "petty offenses."

CONCLUSION

The judgment of the District Court is erroneous and should be reversed.

Respectfully submitted.

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SEPTEMBER, 1932.

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTES

The Act of June 30, 1906, c. 3915, 34 Stat. 768, 770 (U. S. C., Title 21, Secs. 2, 3, 9, 10), known as the Pure Food and Drug Act, provides in part as follows:

> SEC. 2. That the introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or shipment to any foreign country of any article of food or drugs which is adulterated or misbranded, within the meaning of this Act, is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or to a foreign country, or who shall receive in any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages, for pay or otherwise, or offer to deliver to any other person, any such article so adulterated or misbranded within the meaning of this Act, or any person who shall sell or offer for sale in the District of Columbia or the Territories of the United States any such adulterated or misbranded foods or drugs, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding two hundred dollars for the first offense, and upon conviction for each subsequent offense not exceeding three hundred dollars or be imprisoned not exceeding one year, or both, in the discretion of the court: *Provided,* That no article shall be deemed

misbranded or adulterated within the provisions of this Act when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser when no substance is used in the preparation or packing thereof in conflict with the laws of the foreign country to which said article is intended to be shipped; but if said article shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this Act.

SEC. 3. That the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor shall make uniform rules and regulations for carrying out the provisions of this Act, including the collection and examination of specimens of foods and drugs manufactured or offered for sale in the District of Columbia, or in any Territory of the United States, or which shall be offered for sale in unbroken packages in any State other than that in which they shall have been respectively manufactured or produced, or which shall be received from any foreign country, or intended for shipment to any foreign country, or which may be submitted for examination by the chief health, food, or drug officer of any State, Territory, or the District of Columbia, or at any domestic or foreign port through which such product is offered for interstate commerce, or for export or import between the United States and any foreign port or country.

* * * * *

SEC. 8. That the term "misbranded," as used herein, shall apply to all drugs, or ar-

ticles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced.

That for the purposes of this Act an article shall also be deemed to be misbranded:

In case of drugs:

First. If it be an imitation of or offered for sale under the name of another article.

Second. If the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein.*

In the case of food:

First. If it be an imitation of or offered for sale under the distinctive name of another article.

Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package, or if it fail to bear

* An additional paragraph "Third" was inserted here by the Act of August 23, 1912, c. 352, 37 Stat. 416. It is not material in this case.

a statement on the label of the quantity or proportion of any morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any of such substances contained therein.

Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.[10]

Fourth. If the package containing it or its label shall bear any statement, design, or device regarding the ingredients or the substances contained therein, which statement, design, or device shall be false or misleading in any particular: *Provided,* That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale: *Provided,* That the term

[10] This paragraph was amended by the Act of March 3, 1913, c. 117, 37 Stat. 732, which is set out in full, *infra*, pp. 30–31.

blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: *And provided further,* That nothing in this Act shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this Act may require to secure freedom from adulteration or misbranding.

The Act of March 3, 1913, c. 117, 37 Stat. 732, known as the Gould Amendment, provides as follows:

That section eight of an Act entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," approved June thirtieth, nineteen hundred and six, be, and the same is hereby, amended by striking out the words "Third. If in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package," and inserting in lieu thereof the following:

"Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act."

SEC. 2. That this Act shall take effect and be in force from and after its passage: *Provided, however,* That no penalty of fine, imprisonment, or confiscation shall be enforced for any violation of its provisions as to domestic products prepared or foreign products imported prior to eighteen months after its passage.

The Act of December 16, 1930, c. 15, 46 Stat. 1029 (U. S. C. Sup. V, Title 18, Sec. 541), provides as follows:

That section 335 of the Criminal Code, chapter 321, paragraph 335; Thirty-fifth Statutes, page 1152 (sec. 541, title 18, U. S. C.), be amended to read as follows:

"All offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. All other offenses shall be deemed misdemeanors: *Provided,* That all offenses the penalty for which does not exceed confinement in a common jail, without hard labor for a period of six months, or a fine of not more than $500, or both, shall be deemed to be petty offenses; and all such petty offenses may be prosecuted upon information or complaint."

The Act of March 3, 1901, c. 854, Sec. 44, 31 Stat. 1189, 1196, as amended by the Act of March 3, 1925, c. 443, Sec. 4, 43 Stat. 1119, 1120 (D. C. Code, Title 18, Sec. 165) provides as follows:

Prosecutions in the police court shall be on information by the proper prosecuting officer. In all prosecutions within the jurisdiction of said court in which, according to the Constitution of the United States, the accused would be entitled to a jury trial, the trial shall be by jury, unless the accused

shall in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial shall be by such judge, and the judgment and sentence shall have the same force and effect in all respects as if the same had been entered and pronounced upon the verdict of a jury.

In all cases where the accused would not by force of the Constitution of the United States be entitled to a trial by jury, the trial shall be by the court without a jury, unless in such of said last-named cases wherein the fine or penalty may be more than $300, or imprisonment as punishment for the offense may be more than ninety days, the accused shall demand a trial by jury, in which case the trial shall be by jury. In all cases where the said court shall impose a fine it may, in default of the payment of the fine imposed, commit the defendant for such a term as the court thinks right and proper, not to exceed one year.

APPENDIX B

EXTRACTS FROM COMMITTEE REPORTS AND HEARINGS

In the Report of the House Committee on Interstate and Foreign Commerce on the bill which, with some amendments, became the Act of March 3, 1913, involved in this case, it was stated (House Report No. 850, 62nd Congress, 2d Session, pp. 2–4):

> It being apparent to everyone that it is impossible to make packages of exactly the same size or to pack them with exactly the same quantity of contents, and it being also apparent that the exact weight and measure of the contents of a package may undergo slight changes from natural causes, it is also apparent that legislation requiring similar packages to contain the same exact quantity in terms of weight or measure, without allowing for any variation, would be destructive and prevent the putting of foods in packages.
>
> The matter of marking the quantity of contents of food packages has received widespread attention from the manufacturers and producers of foods; from the jobbers and wholesale and retail dealers in foods; from the officials of both the National Government and the different States who are charged with duties in reference to weights and measures; and from those interested in the protection of purchasers and consumers of packed foods. The result of the consider-

ation which has been given to the subject is expressed in the bill which is now reported.

* * * * *

The bill as reported proposes as to those articles classed as "food products" under the terms of the pure-food law, that if they shall be in package form the quantity of the contents shall be plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count, provided, however, that reasonable variations shall be permitted. It is also provided that tolerances shall be established by the Secretary of Agriculture, Secretary of Commerce and Labor, and Secretary of the Treasury by rules and regulations in accordance with the general provisions of the pure-food act. Under the terms of the bill reasonable variations are permitted, whether tolerances are or are not established by the rules and regulations, nor will the tolerances established by the rules and regulations be conclusive upon the courts in determining the question of the reasonableness of the variations, but the establishment of tolerances by rules and regulations will undoubtedly be a great aid to the producers of food products in package form by letting them know in advance what the Government officials believe to be reasonable variations. The establishment of tolerances will also be a great aid to the officials both of the General Government and of the States in connection with the enforcement of the law.

* * * * *

The bill has the indorsement of the National Retail Grocers' Association, the National Wholesale Grocers' Association, the National Canners' Association, the National Confectioners' Association, the American

Specialty Manufacturers' Association, the Chocolate and Cocoa Manufacturers' Association of the United States, the National Flavoring Extract Association, the California Fruit Growers' Association, the Machine Bottle Manufacturers' Association, the Glass Bottle Blowers' Association, the Association for the Promotion of Purity in Foods, the International Stewards' Association, the Southern Hotel Men's Association, the Canners' League of California, the Dried Fruit Association of California, the Association of National and State Dairy and Food Departments, the National Consumers' League Food Committee, the American Flint Glass Workers' Union of the United States and Canada, and various other associations, officials, and individuals, who have given special attention to the subject.

The same language was contained in the Report of the Senate Committee on Manufactures (S. Rep. No. 1216, 62d Cong., 3d Sess., pp. 2–4). This Senate Report also contained some 75 pages of testimony which was taken before the Senate Committee. From this testimony it appears that it was the desire of the trade that the statute require a statement of weight on packaged goods in place of the permissive provision in the original Pure Food and Drug Act. It appeared that several States had already enacted compulsory weight-branding laws and that of these a number provided that reasonable variations should be permitted. During the hearing it was suggested (p. 11) that the measure "certainly would not comply with the recognized rule that a law should be certain in its provisions." But the witness, representing the

National Wholesale Grocers' Association, replied (pp. 12, 16):

> We think such variations, phrased in some language or other, must be granted. It is not a human possibility to put upon every package the true weight or measure.
>
> * * * * *
>
> Now, on that point also it was pointed out in another case in the Supreme Court that a statute of this kind is remedial—it is not a criminal statute. This provision in a strictly criminal statute, where criminal intent must be shown by the Government, would, I admit, vitiate it. But it seems to me a statute of this kind falls within the words of the Supreme Court, in the case of *Taylor* v. *The United States* (3 How. 197), in which Mr. Justice Story said:
>
> "Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in a strict sense, penal acts, although they may inflict a penalty for violation."
>
> Now, the food law does not require as a condition precedent of conviction any criminal intent whatever on the part of the manufacturer, and to that extent it is certainly not a criminal statute. It is nothing more than a quasicriminal statute, and I very frankly admit Senator Heyburn's objection that a provision of this kind was never found in a strictly criminal statute of this country, but that is not so as to remedial statutes.

Similar statements as to the necessity and desirability of the amendment were made by many other witnesses before the committee.

APPENDIX C

REGULATIONS

On May 11, 1914, Regulation 29 of the Rules and Regulations For the Enforcement of the Food and Drugs Act was amended to read as follows (Food Inspection Decision 154):

Statement of Weight, Measure, or Count. (Section 8, paragraph 3, under "Food," as amended by act of March 3, 1913)

(*a*) Except as otherwise provided by this regulation, the quantity of the contents, in all cases of food, if in package form, must be plainly and conspicuously marked, in terms of weight, measure, or numerical count, on the outside of the covering or container usually delivered to consumers.

(*b*) The quantity of the contents so marked shall be the amount of food in the package.

(*c*) The statement of the quantity of the contents shall be plain and conspicuous, shall not be a part of or obscured by any legend or design, and shall be so placed and in such characters as to be readily seen and clearly legible when the size of the package and the circumstances under which it is ordinarily examined by purchasers or consumers are taken into consideration.

(*d*) If the quantity of the contents be stated by weight or measure, it shall be marked in terms of the largest unit contained in the package; for example, if the package contain a pound, or pounds, and a

fraction of a pound, the contents shall be expressed in terms of pounds and fractions thereof; or of pounds and ounces, and not merely in ounces.

(*e*) Statements of weight shall be in terms of avoirdupois pounds and ounces; statements of liquid measure shall be in terms of the United States gallon of 231 cubic inches and its customary subdivisions, i. e., in gallons, quarts, pints, or fluid ounces, and shall express the volume of the liquid at 68° F. (20° C.); and statements of dry measure shall be in terms of the United States standard bushel of 2,150.42 cubic inches and its customary subdivisions, i. e., in bushels, half bushels, pecks, quarts, pints, or half pints: *Provided,* That, by like method, such statements may be in terms of metric weight or measure.

(*f*) The quantity of solids shall be stated in terms of weight and of liquids in terms of measure, except that in case of an article in respect to which there exists a definite trade custom otherwise, the statement may be in terms of weight or measure in accordance with such custom. The quantity of viscous or semisolid foods, or of mixtures of solids and liquids, may be stated either by weight or measure, but the statement shall be definite and shall indicate whether the quantity is expressed in terms of weight or measure, as, for example, "Weight, 12 ounces," or "12 ounces avoirdupois"; "volume, 12 ounces," or "12 fluid ounces."

(*g*) The quantity of the contents shall be stated in terms of weight or measure unless the package be marked by numerical count and such numerical count gives accurate information as to the quantity of the food in the package.

(*h*) The quantity of the contents may be stated in terms of minimum weight, minimum measure, or minimum count, for example, "minimum weight, 16 ounces"; "minimum volume, 1 gallon"; or "not less than 4 ounces"; but in such case the statement must approximate the actual quantity, and there shall be no tolerance below the stated minimum.

(*i*) The following tolerances and variations from the quantity of the contents marked on the package shall be allowed:

(1) Discrepancies due exclusively to errors in weighing, measuring, or counting which occur in packing conducted in compliance with good commercial practice.

(2) Discrepancies due exclusively to differences in the capacity of bottles and similar containers resulting solely from unavoidable difficulties in manufacturing such bottles or containers so as to be of uniform capacity: *Provided,* That no greater tolerance shall be allowed in case of bottles or similar containers which, because of their design, can not be made of approximate uniform capacity than is allowed in case of bottles or similar containers which can be manufactured so as to be of approximate uniform capacity.

(3) Discrepancies in weight or measure due exclusively to differences in atmospheric conditions in various places, and which unavoidably result from the ordinary and customary exposure of the packages to evaporation or to the absorption of water.

Discrepancies under classes (1) and (2) of this paragraph shall be as often above as below the marked quantity. The reasonableness of discrepancies under class (3) of this paragraph will be determined on the facts in each case.

(*j*) A package containing two avoirdupois ounces of food or less is "small" and shall be exempt from marking in terms of weight.

(*k*) A package containing one fluid ounce of food or less is "small" and shall be exempt from marking in terms of measure.

(*l*) When a package is not required by paragraph (*g*) to be marked in terms of either weight or measure, and the units of food therein are six or less, it shall, for the purpose of this regulation, be deemed "small" and shall be exempt from marking in terms of numerical count.

This regulation remains in force to-day without alteration, except for a few changes in phraseology. There have been no changes in paragraph (*i*), which is the paragraph material in this case. The regulation is now known as Regulation 26 of the Rules and Regulations under the Food and Drugs Act, of which the ninth edition was promulgated August 29, 1927.

APPENDIX D

SUMMARY OF STATUTORY PROVISIONS OF THE STATES AND TERRITORIES

The following statutory provisions are the same as or substantially similar to Section 8 of the Federal Food and Drug Act, as amended by the Act of March 3, 1913, in that they provide a penalty for false branding, with a proviso that "reasonable variations" or "tolerances" shall be allowed.[11].

Alabama: Agricultural Code (1927), Sec. 255.

Alaska: No territorial food and drug law; under Sec. 1 of the Federal Act, that Act applies.

California: Cal. Stat. 1913, p. 1086, Sec. 6, as amended by Cal. Stat. 1917, p. 1648.

Connecticut: General Stats. (1930), Sec. 2441.

District of Columbia: No local food and drug law; under Sec. 1 of the Federal Act, that Act applies.

Florida: Comp. Gen. Laws (1927), Sec. 3204.

Georgia: Code (1926), Sec. 2104.

Hawaii: Rev. Laws (1925), Sec. 994; under Sec. 1 of the Federal Act, that Act also applies.

Illinois: Rev. Stat. (1929), c. 56b, Sec. 9.

Iowa: Code (1931), Sec. 3037.

Louisiana: Anno. Rev. Stat. (Marr, 1915), Sec. 689.

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[11] The complete texts of all Federal and State statutes and regulations relating to food and drugs may be found in Dunn, Food and Drug Laws, 3 vols., 1927–1928.

Maine: Rev. Stat. (1930), c. 41, Sec. 20.

Maryland: Anno. Code (Bagby, 1924), Art. 43, Sec. 192.

Massachusetts: Gen. Laws (1921), c. 94, Sec. 192.

Michigan: Comp. Laws (1929), Sec. 5428.

Minnesota: Statutes (Mason, 1927), Sec. 3792.

Missouri: Rev. Stat. (1929), Sec. 13022.

Nevada: Comp. Laws (1929), Sec. 8295.

New Hampshire: Pub. Laws (1926), c. 139, Sec. 7.

New Jersey: Comp. Stat. (Supp. 1924), Sec. 81–4.

New York: Cons. Laws (1930), c. 1, Sec. 194.

North Carolina: Code (1931), Sec. 4760.

Oregon: Code (1930), Sec. 41–216.

Rhode Island: Gen. Laws (1923), Sec. 2383.

South Dakota: Comp. Laws (1929), Sec. 7809.

Tennessee: Code (1932), Sec. 6585.

Texas: [Sec. 8 of c. 130 of the Acts of 1919, which was held unconstitutional in *Ex Parte Humphrey*, 92 Tex. Crim. 501, was repealed in 1923. Texas Laws, 38th legislature, 1st, 2nd, 3rd called sessions, c. 53, Sec. 10.]

Utah: Comp. Laws (1917), Sec. 1928.

Vermont: Gen. Laws (1917), Sec. 6270.

Virginia: Code (1924), Sec. 1182.

Washington: Code (Pierce, 1929), Sec. 2538.

Wisconsin: Statutes (1929), Sec. 352.08.

Wyoming: Rev. Stat. (1931), Sec. 45–109.

In the following States statutes are in force which are substantially the same as Section 8 of the Federal Food and Drug Act, as it was before it was amended by the Act of March 3, 1913. These

statutes make no provision for "reasonable variations" or "tolerances."

Arkansas: Digest of Stats. (1921), Sec. 4823.
Colorado: Comp. Laws (1921), Sec. 1002.
Delaware: Laws of 1921, c. 190, Sec. 4.
Idaho: Comp. Stat. (1919), Sec. 1692.
Indiana: Statutes (Burns, 1926), Sec. 8228.
Kansas: Rev. Stat. (1923), Sec. 65–608.
Kentucky: Statutes (1930), Sec. 2060a–2.
Mississippi: Code (1930), Sec. 4962.
Montana: Rev. Code (1921), Sec. 2587.
Nebraska: Comp. Stat. (1929), Sec. 81–904.
North Dakota: Comp. Laws (Supp. 1925), Sec. 2889b6. [Comp. Laws (1913), Sec. 3010, provided for "reasonable variations," but this section was repealed by N. D. Laws 1923, c. 222, Sec. 27.]
Ohio: Gen. Code, Sec. 5785.
Oklahoma: Statutes (1931), Sec. 4543.
Pennsylvania: Stats. Ann., Title 31, Sec. 4.
South Carolina: Code (1922), Crim. L., Sec. 398.
Texas: Penal Code (1925), Art. 708.

The statutes of Arizona and New Mexico contain no comparable provision. See Arizona Rev. Code (1928), Secs. 3608–35; New Mexico Ann. Stat. (1929), Secs. 53–101 to 53–123.

ENGLISH STATUTES

By Section 12 of the Sale of Food (Weights and Measures) Act, 1926 (16 & 17 Geo. V, c. 63), it is provided that in any proceeding under the Act "the court shall disregard any inconsiderable variation in the weight or measure of a single article, and shall have regard to the average weight or measure

of a reasonable number of other articles of the same kind (if any) sold or delivered by the defendant, or in his possession for the purpose of sale or delivery, on the same occasion, and generally to all the circumstances of the case." It is also provided that the defendant shall be discharged if he "proves to the satisfaction of the Court that such deficiency was due to a *bona fide* mistake or accident, or other causes beyond his control, and in spite of all reasonable precautions being taken * * *."

See also the Weights and Measures Act, 1904, 4 Edw. VII, c. 28, Sec. 5.

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